No. 18794

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ANTHONY MARCELLA,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLEE.

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IN THE

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ANTHONY MARCELLA,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLEE.

I.
JURISDICTION.

This is an appeal from an order, with findings of fact and conclusions of law, of the United States District Court for the Southern District of California, entered April 16, 1963, denying appellant's motion to vacate and set aside his sentence, judgment and indictment which motion had been made under the provisions of Title 28, United States Code, Section 2255.

The jurisdiction of the District Court rested on Title 21, United States Code, Section 174 and Title 28, United States Code, Section 2255.

This Court has jurisdiction to review the judgment of the District Court denying appellant's "2255 motion," pursuant to Title 28, United States Code, Sections 1291, 1294.

II.

STATEMENT OF THE CASE.

On April 15, 1959, a six-count indictment was returned by the Grand Jury for the Southern District of California, charging appellant and codefendants Marie Rose Santino and Matthew Santino with various violations of Title 21, United States Code, Section 174. Appellant was charged in five counts. Counts Two and Three charged him with the unlawful receipt, concealment, transportation and facilitation of the concealment and transportation and sale of one pound of heroin on or about November 30, 1958. Counts Three and Four charged him with similar offenses on December 15, 1958. Count Six charged him with a conspiracy with the codefendants and an unindicted co-conspirator, Quentin V. Browning. All violations were alleged to have occurred in Los Angeles County, California, within the Central Division of the Southern District of California [T. T. 1-9].[1]

On May 4, 1959, appellant, represented by counsel, Russell E. Parsons and Edward I. Gritz, was arraigned and entered pleas of not guilty before the Honorable Harry C. Westover [T. T. 10].

On August 4, 1959, jury trial commenced before the Honorable William C. Mathes, appellant being represented by his same two counsel [Ex. A].[2] On August

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[1]T. T. is Volume I of the Trial Transcript, pp. 1-118. Volume I of the Transcript of the Trial proceedings was not introduced as an Exhibit in the 2255 proceedings but was a part of the record in this Court during the appellant's direct appeal from his conviction. *Marcella v. United States,* 285 F. 2d 322 [9 Cir. 1960]. Volumes II and III of the Transcript of the Trial proceedings were introduced at the 2255 hearing as Exhibits A and B, respectively.

[2]Exhibit A is Volume II of the Trial Transcript, pp. 1-117.

6, 1959, the jury found appellant guilty on all counts with which he was charged [T. T. 99].

On August 11, 1959, appellant, through his two attorneys, filed a motion for a new trial [T. T. 100-101] which was denied on August 14, 1959 [Ex. C].[3] On the same date appellant was sentenced by Judge Mathes to the custody of the Attorney General for a period of 20 years on each of Counts Two through Five, respectively, and for a period of five years on Count Six. The 20-year sentences imposed on Counts Two and Three were ordered to run concurrently with each other; and the 20-year sentences imposed on Counts Four and Five were also ordered to run concurrently with each other. The 5-year sentence imposed on Count Six was ordered to run concurrently with the 20-year sentence imposed on Count Two. It was finally adjudged that the concurrent 20-year sentences imposed on Counts Two and Three were ordered to run consecutively to the concurrent 20-year sentences imposed on Counts Four and Five. The total time of imprisonment was thus ordered to be 40 years [T. T. 103-5, Ex. C. 9-10].

On August 18, 1959, appellant through his attorneys, Parsons and Gritz, filed a timely notice of appeal from the judgment and commitment of the District Court [T. T. 108-9]. Appellant's counsel, on August 1, 1960, filed an 84-page opening brief in this court raising four questions, one of which was the alleged insufficiency of the indictment [Ex. D].[4] This Court affirmed appellant's conviction in *Marcella v. United States,* 285

[3]Exhibit C is Transcript of August 14, 1959 proceedings, pp. 1-14.

[4]Exhibit D is Appellant's Opening Brief in this Court on the appeal from the judgment of conviction.

F. 2d 322 (9 Cir. 1960). A subsequent petition for rehearing, filed by appellant's same counsel, was denied on February 3, 1961 [Ex. E].[5] Thereupon, appellant's counsel, Russell E. Parsons, filed a petition for Writ of Certiorari in the United States Supreme Court [Ex. H],[6] which petition was denied on May 1, 1961. *Marcella v. United States,* 366 U. S. 911 (1961). Appellant next filed on October 17, 1962 a motion to vacate and set aside the sentence, judgment and indictment pursuant to Title 28, United States Code, Section 2255, alleged grounds for such being:

1. The indictment, conviction and sentence were void because the Grand Jury which returned the indictment had no jurisdiction;

2. The appellee knowingly used perjured testimony of Marie Rose Santino at the trial of appellant; and

3. Appellant was denied the effective assistance of counsel at trial [C. T. 2-4].[7]

On December 3, 1962, appellant and his court-appointed attorney, Marvin Warren, appeared before the Honorable Jesse W. Curtis at a hearing on the 2255 motion [C. T. 69]. In continuing the hearing to December 10, 1962, the Court stated that the only ground it felt it could inquire into was the allegation that there had been perjured testimony at the trial [R. T. 11].[8] Judge Curtis declared that the other matters raised in the 2255 motion had been decided by the Appellate Court

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[5]Exhibit E is Appellant's Petition for Rehearing in this Court.

[6]Exhibit H is Appellant's Petition for Writ of Certiorari filed in the United States Supreme Court.

[7]C. T. refers to Clerk's Transcript of the 2255 proceedings.

[8]R. T. refers to Reporter's Transcript of the 2255 proceedings.

and he saw no reason or basis to re-examine them [R. T. 8].

Appellant and his counsel again appeared before the Court on December 10, 1962 [C. T. 70] where Mr. Warren stated that he had been unable to uncover any basis for perjured testimony in the case [R. T. 16]. Appellant then asked the Court to appoint him another attorney [R. T. 17]. The Court replied that it had read the papers filed by appellant, listened to him and to his attorney, and that the matter would stand submitted [R. T. 19].

On February 8, 1963, appellant, through new counsel, Edward Lascher, filed a motion to re-open the hearing on appellant's 2255 motion [C. T. 71]. Further proceedings were held on February 18, 1963 [C. T. 79] at which time Judge Curtis vacated the order appointing Marvin Warren as appellant's counsel and appointed Mr. Lascher as appellant's new counsel. The Court then stated that it would grant appellant's motion to re-open the hearing to take further testimony [R. T. 22, 25]; and remarked that it had encouraged the re-opening of the hearing because it felt there had not been enough testimony and that the previous hearing was not a complete hearing. Judge Curtis particularly mentioned the fact that the defendant had not had an opportunity to testify [R. T. 24]. Mr. Lascher informed the Court that he believed the only issue at the hearing was a factual question, *i.e.*, whether there was knowing use of perjured testimony on the part of the Government. He conceded that the other two issues raised by the appellant in his original motion had been considered on the appeal from the original judgment, and that he did not believe they were again

open to question under this motion [R. T. 23-24]. In conclusion the Court ordered that a Writ of Habeas Corpus ad Testificandum be issued for appellant's appearance on March 11, 1963, two weeks prior to the date set for the hearing, March 25, 1963, in order to give appellant an opportunity to discuss the case with his counsel and to subpoena any necessary witnesses [R. T. 27].

On March 25, 1963, appellant, through his attorney, sought a continuance of the hearing in order to facilitate subpoenaing those witnesses he felt would be necessary for the hearing [C. T. 80; R. T. 31]. The Court again granted a continuance of the hearing until April 1, 1963 [C. T. 80; R. T. 32].

Mr. Lascher, on behalf of appellant, filed in the District Court on March 29, 1963, a "Petitioner's Hearing Memorandum," which raised nine alleged grounds for granting appellant's 2255 motion [C. T. 81]. The memorandum included those contentions posited by appellant in his original Section 2255 motion, with the exception of the contention of ineffective assistance of counsel.

On April 1, 1963, a complete evidentiary hearing on appellant's 2255 motion was held [C. T. 107]. Six witnesses testified, in addition to appellant, and ten exhibits were admitted into evidence [C. T. 107]. All of the witnesses, whom appellant requested, were subpoenaed by appellee prior to the hearing except one individual whom the Government was unable to serve [R. T. 164]. At the conclusion of the hearing the Court allowed appellant's original 2255 motion to be amended to include all the grounds raised in appellant's "hearing

memorandum" [R. T. 175]. (It is noted that the grounds raised in appellant's "hearing memorandum" included the five issues which are presently before this Court on appeal. More specifically, they are Points 2, 3, 4, 6 and 9 of the "hearing memorandum" [C. T. 81].) The Court ordered the matter to stand submitted, and continued the hearing to April 15, 1963 for a ruling.

The Court denied the 2255 motion on April 15, 1963, stating that he and his law clerk had studied, considered, and discussed the points raised by appellant [C. T. 116; R. T. 191]. The following day Judge Curtis entered a written order denying appellant's 2255 motion. The order recited in part:

> "The Court, being now fully advised, finds that during the trial of the petitioner upon the charges for which he was convicted, the Government did not knowingly use perjured testimony, if indeed the testimony was in fact perjured, and the Court further finds that the remaining grounds asserted in petitioner's motion are not proper grounds for collateral attack upon the judgment of a conviction.
>
> It Is Therefore Ordered that petitioner's motion to vacate and set aside the sentence, judgment and indictment is hereby denied." [C. T. 117-119].

Appellant filed on Airil 19, 1963, a notice of motion for leave to appeal *in forma pauperis,* from the Court's order denying his 2255 motion [C. T. 120-121], and on April 30, 1963, filed a Notice of Appeal from the order [C. T. 127]. On the latter date Judge Curtis entered a written order permitting appellant to appeal *in forma pauperis* [C. T. 128].

III.

STATUTES INVOLVED.

The Indictment was brought under Title 21, United States Code, Section 174, which provides, in pertinent part, as follows:

> "Whoever fraudulently or knowingly . . . receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought into the United States contrary to law, or conspires to commit any such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than 20 years, and in addition may be fined not more than $20,000. . . .
>
> "Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

Appellant's motion, the denial of which is the basis of this appeal, was made pursuant to the provisions of Title 28 U. S. C., Section 2255, which provides, in pertinent part, as follows:

> "A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack,

may move the court which imposed the sentence to vacate, set aside or correct the sentence.

". . .

"Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall . . . grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. . . .

". . .

"An appeal may be taken to the Court of Appeals from the order entered on the motion as from a final judgment or application for a writ of habeas corpus."

IV.

SUMMARY OF ARGUMENT.

The District Court was correct in its finding from the facts developed at the 2255 hearing, that ". . . the Government did not knowingly use perjured testimony, if indeed the testimony was in fact perjured. . . ." The record of the trial and of the 2255 hearings, clearly show that the principal witnesses, whose testimony appellant claims was perjured, told the truth at trial. Appellant has pointed at statements in Mrs. Stantino's testimony at the hearing as contradictory of statements by her at trial and concludes she perjured herself at trial. The record shows that at the hearing Mrs. Santino had difficulty remembering certain events about which she testified at trial three and a half years before. Nevertheless her testimony at the hearing, concerning the important facts material to appellant's conviction, was the same as at

trial. Nor does the record shows material contradiction between Matthew Santino's testimony at trial and his testimony at the hearing. There has been no demonstration of perjury occurring at the original trial in this case.

The hearing record disproves the contention that any law enforcement official, including the Assistant United States Attorney who prosecuted appellant's case, coerced, threatened, or promised any type leniency to the Santinos or anyone else in exchange for any testimony, true or false.

The District Court was correct in denying appellant's 2255 motion because the stated grounds, other than the alleged perjured testimony, were not proper contentions for collateral relief. Appellant now contends that the District Court erred in such ruling as it related to four issues: (1) the failure of his representation by counsel at the preliminary hearings before the United States Commissioner, (2) the failure of his being tried in the Judicial District where the offenses were committed, (3) the insufficiency of the indictment and (4) the punishment imposed was cruel and unusual.

Lack of counsel at proceedings before the Commissioner is not a violation of appellant's right to due process and, therefore, is not a valid basis for collateral relief under Section 2255. This is particularly so in light of the nature of the proceeding at which he appeared without counsel.

The trial record overwhelmingly demonstrates that the Southern District of California was the proper District in which to try appellant for the offenses of which he was convicted. Furthermore, appellant did not raise such question at the trial or appellate level and consequently waived his right to raise such an issue in a 2255 motion. Nor has appellant overcome the statutory presumption in Title 21 United States Code, Section 174, that proof of possession establishes the place of concealment, transportation and sale is as alleged in the indictment.

The sufficiency of the indictment was determined by this Court during appellant's direct appeal from his conviction and the attack on same was found to be without merit. This issue cannot be re-questioned in a collateral attack by a 2255 motion. Additionally, the sufficiency of the indictment is not raisable as a ground for 2255 motion unless it is so fatally defective on its face that it does not reasonably charge an offense and show jurisdiction. The indictment in this case speaks for itself and reveals a properly charged offense.

Appellant's punishment was within the maximum authorized by law and, therefore, is not a proper ground for a 2255 motion. In any event such a punishment is not cruel and unusual punishment.

V.

STATEMENT OF FACTS.

A. Pre-Trial Proceedings.

On March 19, 1959, at approximately 8:00 p.m., appellant was arrested, pursuant to an arrest warrant, at his home in Sherman Oaks, California, by agents of the Federal Bureau of Narcotics [R. T. 53]. At approximately 2:00 a.m. the next morning, appellant's uncle, Anthony B. Pumelia, advised Murray Keslar, an attorney, that appellant had been arrested. At this time Mr. Pumelia asked Mr. Keslar if he would represent appellant and stated that appellant's bail would be set in the morning at about 10:00 a.m. [R. T. 38]. Mr. Keslar told Mr. Pumelia that he could not be present at the United States Commissioner's office at 10:00 a.m. since he had a case in Los Angeles Superior Court at 9:00 a.m., but would go there as soon as possible [R. T. 38].

At approxmately 10:00 a.m., on March 20, 1959, Mr. Keslar, who was then in the Los Angeles Superior Court, spoke by telephone to United States Commissioner Theodore Hocke concerning the bail to be set for appellant at the proceedings then pending before the Commissioner. Commissioner Hocke advised Mr. Keslar that he intended to set bail in the amount of $50,000. Mr. Keslar told the Commissioner that he felt that was "pretty high" and that he would come over to the Commissioner's office. The Commissioner informed Mr. Keslar that "we are just ready to take it up now, to set his bail now." [R. T. 39]. After the phone call, Mr. Keslar proceeded to the Commissioner's office. The bail setting proceeding had already terminated [R. T. 39].

Mr. Keslar testified at the 2255 hearing that at the time of the proceedings before the Commissioner, he had not been hired as attorney for appellant [R. T. 41] and that the only relationship he had to appellant in the matter was the phone call with Commissioner Hocke concerning the bail; several discussions with appellant at the jail [R. T. 41, 43]; and an appearance at the court on the morning appellant was arraigned and pleaded. At the time of entering his plea, appellant advised Mr. Keslar that he had another attorney, and Mr. Keslar thereupon requested that he be relieved as counsel. Mr. Keslar testified that ". . . he never had a deal" with the appellant [R. T. 44]; that he never attempted to have appellant's bail reduced; and that he had no idea whether a preliminary hearing was ever set by the Commissioner [R. T. 41, 43].

Daniel T. Casey and Lawrence Katz, agents of the Federal Bureau of Narcotics, who were present at the proceedings before the United States Commissioner on March 20, 1959, testified at the 2255 hearing that the proceedings consisted solely of the appellant being arraigned, bail being set, and the date for a preliminary hearing being set for a future time [R. T. 61, 166-167].

Appellant also testified at the 2255 hearing that his bond was set at $25,000 during the proceedings before the Commissioner [R. T. 147]. Appellant has mentioned no other occurrence before the Commissioner except his request that the Commissioner wait because "he had an attorney to represent him." Appellant's testimony in no way referred to any statements, pleas, waivers, or preliminary hearing conducted at this time before the Commissioner.

B. Testimony at Trial.

1. Marie Rose Santino.

In the middle of October, 1958, witness Marie Rose Santino spoke by telephone with appellant, who was in Los Angeles, concerning obtaining of narcotics [Ex. A, 9-10]. She and appellant thereafter left Los Angeles by plane on or about October 22, 1958, and flew to San Francisco where she met Mr. Quentin Browning concerning money for the purchase of narcotics [Ex. A, 14, 63]. On the same day, after receiving $7000 from Mr. Browning, she and appellant flew to Chicago to obtain narcotics [Ex. A, 20]. While in Chicago she used the assumed name "Sandino" [Ex. A, 23, 65, 67]. Subsequently, she and appellant returned by plane from Chicago to Los Angeles where appellant gave her a package containing heroin [Ex. A, 31]. She and a girl friend then flew to San Francisco and delivered the package of narcotics to Quentin Browning [Ex. A, 33-35, 76-77].

Three weeks later Mrs. Santino and appellant discussed by telephone the obtaining of more narcotics for Mr. Browning [Ex. A, 37-39]. After this phone conversation, in November, 1958, she and appellant flew from Los Angeles to Chicago to again acquire narcotics. She again used the assumed name of "Sandino" in Chicago [Ex. A, 39-40, 84-85]. After she and appellant returned by plane to Los Angeles, from Chicago, appellant gave her another package of heroin. She and her husband, Matthew Santino, attempted to deliver this package to Mr. Browning in San Francisco but he would not accept it because of supposed inferior quality [Ex. A, 41-42]. That same day, the Santinos returned the undelivered package of heroin to appellant at his store on

Ventura Boulevard in Los Angeles [Ex. A, 45], at which time she overheard a telephone conversation between appellant and Browning concerning Browning coming to Los Angeles to see appellant about the narcotics [Ex. A, 46-48]. Browning and appellant later met at her home in Los Angeles and discussed this second package of heroin [Ex. A, 48-49].

In the middle of December 1958, at her home in Los Angeles, she observed appellant wrapping a package of heroin for shipment to Browning in San Francisco [Ex. A, 50-51].

In February 1959 she was present in appellant's store in Los Angeles and heard a conversation between appellant and Browning concerning the quality of heroin which appellant had obtained for Browning [Ex. A, 52].

Mrs. Santino also testified that had used heroin and other narcotics on previous occasions [Ex. A, 61, 72].

2. Matthew Santino.

On or about November 30, 1958 Santino and his wife, Marie Rose Santino, returned a package of narcotics to appellant in Los Angeles which they previously had taken to San Francisco to deliver to Mr. Browning [Ex. B, 192-195].[9]

In December 1958 he observed the appellant, with the assistance of Mrs. Santino, wrapping a package of heroin in their home in Los Angeles [Ex. B, 195-196].

Prior to the time of their taking the package to Mr. Browning, he had used heroin by sniffing it [Ex. B, 194].

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[9]Exhibit B is Volume III of the Trial Transcript, pp. 118-269.

3. Quentin Browning.

Pursuant to a previous arrangement with appellant Marcella, Browning met appellant at Mrs. Santino's home in Hollywood, California in the latter part of November, 1958 [Ex. B, 120, 135-136].

On October 23, 1958 Mrs. Santino gave him a package of heroin in San Francisco [Ex. B, 127, 131, 169-170]; and in November 1958 Mrs. Santino and her husband delivered another package of heroin to him in San Francisco [Ex. B, 132, 133, 174-176].

During a meeting with appellant in his (Browning's) home in San Francisco, appellant told Browning that he had 15 or 16 ounces of heroin in Los Angeles. Arrangements were then made for appellant to ship that heroin to Browning from Los Angeles [Ex. B, 138-139]. Three days after this meeting, Browning received, via Greyhound, from Los Angeles, a package containing 15 ounces of heroin. The name of the sender on the package was the assumed name which appellant had told Browning he would use [Ex. B, 139-143, 178-179].

Browning met appellant at appellant's store in Los Angeles in February 1959 concerning the sale of narcotics [Ex. B, 146-149, 180-181].

4. Appellant Anthony Marcella.

Appellant admitted at trial that he had taken two roundtrip flights with Mrs. Santino, from Los Angeles to Chicago, in October and November 1958 [Ex. B, 221, 224, 229].

C. Testimony at 2255 Hearing.

1. Marie Rose Santino.

Mrs. Santino testified at the April, 1963 hearing: that she did not remember how long she had known Mr. Browning, but she had known him "a long time" [R. T. 97]; that she never used hard narcotics, including heroin, but had used marihuana [R. T. 100]; that the testimony she gave at the appellant's trial was true [R. T. 102]; and that she had never gone by any other name except her maiden name "Sardo". After her recollection was refreshed by appellant's counsel, she recalled that she had gone by an assumed name in Chicago, "Santez, or some other name "close to Santino. . . . I didn't even remember that, but I do remember it now." [R. T. 107].

Regarding trips to San Francisco, Mrs. Santino testified that she could not really remember how many times she went to San Francisco to sell narcotics to Mr. Browning but thought it was only one time with her husband. Her testimony concerning this subject follows:

> "Q. So it is your best recollection that there was only one sale to Mr. Browning in San Francisco, and only one trip to San Francisco? A. Myself and my husband?
>
> Q. Yes, you never went there with Mr. Marcellla? A. I don't really remember, truthfully.
>
> Q. The one time you did was for the purpose of transporting narcotics, was it not? A. Yes; and we brought it right back . . ." [R. T. 112].
>
> Q. How many times would you say in your lifetime you had made deliveries of narcotics? A. That one time." [R. T. 112].

* * *

"A. We went the one time, my husband and myself; and I don't remember whether I went with him or not. I don't think so. I really don't remember, truthfully." [R. T. 113].

* * *

"A. When I came back from back East, I think that I went from Chicago to San Francisco, and then came down, and then my husband and I both went up" [R. T. 114].

* * *

"A. It has been so long ago. Like I say, I don't really remember." [R. T. 114].

Mrs Santino also testified that she had never been promised leniency by anyone and had never told appellant that leniency had been promised to her [R. T. 101]; or that she had been threatened not to change her story [R. T. 102].

2. Matthew Santino.

Mathew Santino testified at the April 1963, hearing; that prior to testing the package of heroin, which he and his wife had taken to San Francisco for delivery to Browning, he had used narcotics— ". . . had smoked marihuana. I had sniffed heroin prior to this" [R. T. 128]; but had become addicted to heroin only after tasting the heroin in the package they delivered to Browning [R. T. 123]. Mr. Santino also testified that the Government had never promised him leniency [R. T. 119-20].

3. Agent Daniel Casey.

Agent Casey testified that he was present at the time the Santinos testified in court at the trial and their testimony was substantially the same at trial as was what they told him in a pretrial interview [R. T. 60-63].

The Santinos were never promised any consideration for their testimony prior to trial of appellant [R. T. 60].

4. Former Assistant United States Attorney Norman W. Neukom.

Referee in Bankruptcy Neukom was with the United States Attorney's office for about 25 years, except for a period in the Navy, and held the position of Chief Trial Attorney for the United States Attorney's office [R. T. 68]. During this period he tried at least 1200 to 1500 cases for the Government, and handled approximately 200 appeals [R. T. 73, 91].

Referee Newkom traced the history of appellants case in the following manner:

On July 6, 1959 appellant's case was assigned to him to try for the Government [R. T. 69].

> ". . . Mrs. Santino, if I might generalize, testified at the trial virtually in the same words and the same facts as was contained in the statement that I had before me when I had interviewed her" [R. T. 71].
>
> Mr. and Mrs. Santino ". . . testified at the trial almost precisely the same as they had told me upon at least two occasions prior to the trial as to what they could testify to and what they would testify to . . . and if they fabricated at all during the trial they did so under their own conscience, not by any direction or suggestion upon my part. . . . I have never stated to anyone that they lied. In fact I believed what they testified to must have been the truth or I would not have placed either one of them upon the stand." [R. T. 72].

He never stated to anyone that the Santinos had lied on the stand [R. T. 72].

He "most certainly did not" tell Mrs. Santino that she had better stick to her story if she did not want to be sent to prison for a long time [R. T. 76]; or that she would not have to serve a prison sentence if she would testify in favor of the Government [R. T. 71].

He never communicated with Judge Wm. Mathes regarding the sentence to be imposed upon appellant [R. T. 75].

Mrs. Santino never told him that she desired to give testimony different from the story she previously told him or to change her testimony [R. T. 90]; and he never suggested to Mrs. Santino the way she should testify [R. T. 90].

5. Agent Lawrence Katz.

Agent Katz testified that he had discussions with appellant on August 10 and 14, 1959 concerning matters unrelated to appellant's trial. On neither occasion did appellant mention a visit to him by Mrs. Santino, nor did he say anything about Mrs. Santino having told him that she had lied on the stand or that she had been threatened by Mr. Neukom [R. T. 167-170].

VI.
ARGUMENT.

A. The District Court Did Not Err in Its Finding That ". . . the Government Did Not Knowingly Use Perjured Testimony, if Indeed the Testimony Was in Fact Perjured".

A court's judgment on a 2255 motion has presumptive validity, *United States v. Winhoven,* 14 F. R. D. 18 (N.D. Cal. 1953), *app. dism'd* 209 F. 2d 417 (9 Cir. 1953), and a court's findings of fact with respect to evidence admitted at a 2255 hearing, must be clearly erroneous before an appellate court will overrule a judgment and order based on such findings.

Morse v. United States, 324 F. 2d 80 (8 Cir. 1963);

United States v. Di Palermo, 228 F. 2d 901 (2 Cir. 1955), *cert. den.* 351 U. S. 912 (1956);

Johnston v. United States, 292 F. 2d 51 (10 Cir. 1961), *cert. den.* 368 U. S. 906 (1961);

Hearn v. United States, 194 F. 2d 647 (7 Cir 1952), *cert. den.* 343 U. S. 968 (1952).

The movant in a 2255 proceeding has the burden of proving, by a preponderance of the evidence, that his constitutional rights were violated at the trial, and such burden is particularly severe if the judgment of conviction has already been affirmed.

Twining v. United States, 321 F. 2d 432 (5 Cir. 1963) *cert. den.* 376 U. S. 965 (1964);

Miller v. United States, 261 F. 2d 546 (4 Cir. 1958);

Bishop v. United States, 223 F. 2d 582 (D. C. Cir. 1955), *vacated on other grounds* 350 U. S. 961 (1956);

United States v. Robinson, 143 F. Supp. 286 (W.D. Ky. 1956).

An appellate court in reviewing a judgment by the lower court will not second guess the trier of fact who has heard the testimony, scrutinized the witnesses and noted their demeanor and behavior on the witness stand.

Davis v. United States, 327 F. 2d 301 (9 Cir. 1964);

Maldanado v. United States, 325 F. 2d 295 (9 Cir. 1963);

Perez v. United States, 297 F. 2d 648 (9 Cir. 1961).

It is well established law that a judgment and sentence will not be vacated on the ground of perjured testimony unless the moving party shows by a preponderance of the evidence that (1) the testimony was perjured, and (2) the prosecuting officials knowingly and intentionally used such testimony to secure a conviction.

Mooney v. Holohan, 294 U. S. 103, 112 (1935);

Black v. United States, 269 F. 2d 38 (9 Cir. 1959), *cert. den.* 361 U. S. 938 (1960);

Holt v. United States, 303 F. 2d 791 (8 Cir. 1962);

United States v. Mauriello, 289 F. 2d 725 (2 Cir. 1961);

Smith v. United States, 252 F. 2d 369, 371 (5 Cir. 1958);

United States v. Jakalski, 237 F. 2d 503, 505 (7 Cir. 1956), *cert. den.* 353 U. S. 939 (1957), *reh. den.* 353 U. S. 978 (1957);

Taylor v. United States, 229 F. 2d 826 (8 Cir. 1956), *cert. den.* 351 U. S. 986 (1956);

United States. v. Rutkin, 212 F. 2d 641 (3 Cir. 1954);

Tilghman v. Hunter, 167 F. 2d 661 (10 Cir. 1948).

The movant additionally must prove that the alleged perjured testimony was so material as to contribute to the conviction and of such substance, in relation to the evidence at trial, as to violate movant's right to due process.

Perry v. United States, 297 F. 2d 100 (9 Cir. 1962);

Weaver v. United States, 263 F. 2d 577 (8 Cir. 1959), *cert. den.* 359 U. S. 1014 (1959);

Griffin v. United States, 258 F. 2d 411 (D.C. Cir. 1958), *cert. den.* 357 U. S. 922;

Smith v. United States, supra;

United States v. Gonzalez, 33 F. R. D. 280 (S.D.N.Y. 1960), *aff'd* 321 F. 2d 638 (2 Cir. 1963).

1. The Testimony of Marie Rose Santino at Appellant's Trial Contained No Perjured Statements.

Appellant bases his contention that Marie Rose Santino testified falsely at his trial on what he suggests to be factual inconsistencies between her trial and 2255 hearing testimony. It is here submitted that her statements at trial were in fact the truth, and if inconsisten-

cies there were at the hearing three and one-half years after the trial, they were as to trivial matters and did not relate to testimony which contributed substantially to appellant's conviction.

Appellant has pointed to Mrs. Santino's hearing testimony that she had never used heroin or hard narcotics, whereas she had testified at trial that she had used heroin. It is doubtful whether Mrs. Santino's use of heroin materially affected the jury in its decision that appellant had possessed and sold heroin on two occasions and conspired to sell heroin. Its relevancy at trial probably related to Mrs. Santino's credibility and her admission at the trial of such use may have weakened her credibility as a Government witness — a result favorable to appellant's defense. Consequently Mrs. Santino's denial at the 2255 hearing that she had used hard narcotics reflects no material contradiction with her trial testimony.

Appellant further argues, that at trial Mrs. Santino testified she used an assumed name in Chicago, but flatly denied using such at the Section 2255 hearing. The record shows no such denial. After her recollection was refreshed at the hearing, she admitted using an assumed name in Chicago but could not recall the exact name [R. T. 107].

Appellant further claims that Mrs. Santino perjured herself at trial because she stated she knew Quentin Browning since 1946, and at the Section 2255 proceeding she said she could not remember how long she knew him, but that it was for a long time. These two statements as to Mrs. Santino's acquaintanceship with Mr. Browning are not contradictory. Knowing an indi-

vidual for a period of 17 years, is "a long time". Even if this constituted a conflict, it is so trivial that it suggests no perjury by Mrs. Santino at trial. *Boisin v. United States,* 181 F. Supp. 349 (S.D. N.Y. 1960).

Appellant finally asserts that Mrs. Santino perjured herself at trial because she there testified that she had made three or four trips to San Francisco to deliver narcotics to Mr. Browning; and at the 2255 hearing she testified that she made only one trip to deliver narcotics to San Francisco. Appellant distorts Mrs. Santino's testimony at trial. She never testified that she made three or four trips to San Francisco to deliver narcotics to Mr. Browning. She testified that she could recall having made three trips to San Francisco to see Mr. Browning — two trips to deliver narcotics, and one trip to acquire money with which she and the appellant were to buy narcotics in Chicago.

Appellee submits that Mrs. Santino's testimony, concerning the number of trips to San Francisco to deliver narcotics, is not as precise as appellant indicates in his brief. Mrs. Santino's testimony at the hearing was very indefinite as to whether she took more than the one trip with her husband. She could not remember after three and one-half years. The latter trip, which she definitely recalled, was material evidence in proving Counts Two and Three, and was strongly corroborated by Mr. Quentin Browning who testified at the trial. Consequently, Mrs. Santino's failure to recall at the 2255 hearing an earlier trip does not show that she perjured herself at trial. The more important of the two trips she did recall.

2. The Testimony of Matthew Santino at Appellant's Trial Contained No Perjured Statements.

Appellant contends in general and conclusionary terms that Mr. Santino perjured himself at trial. He fails to substantiate such claim factually — stating it would not add anything to give extensive coverage to the discrepancies and inconsistencies. Appellant's failure to particularize is a proper basis for the Court's not considering such claim related to Mr. Santino's testimony. As noted in *Holt v. United States,* 303 F. 2d 791 (8 Cir. 1962) *cert. den.,* 372 U. S. 970 (1963), perjured testimony need not be considered pursuant to a 2255 motion unless the motion and briefs particularize definitely the perjured testimony alleged to have been knowingly used. See also *United States v. Jenkins,* 281 F. 2d 193 (3 Cir. 1960).

Appellant's argument that the demeanor of the Santinos, in their testimony at the 2255 hearing, suggested that they perjured themselves at trial is a conclusionary statement and the credibility of witnesses at trial is not subject to consideration and review under a 2255 motion.

Dean v. United States, 265 F. 2d 544 (8 Cir. 1959);

United States v. Rosenberg, 200 F. 2d 666, 671 (2 Cir. 1952) *cert den.* 345 U. S. 965 (1953) *reh. den.,* 345 U. S. 1003 (1953).

At page 13 of his brief appellant states that the Santinos and Mr. Browning were richly rewarded by the Government through propositions of leniency in exchange for their testimony against appellant. All of the witnesses at the 2255 hearing categorically denied any suggestion of leniency being made to any witness or suggestion as to how they should testify.

3. Appellee Did Not Knowingly or Intentionally Use Perjured Testimony at Appellant's Trial.

Appellant has suggested that the United States Attorney's office and agents of the Federal Bureau of Narcotics agreed and combined to use perjured testimony at appellant's trial. Messrs. Neukom, Katz and Casey testified that the Santinos' trial testimony constituted materially the same story that was told to them during pre-trial interviews. These three witnesses specifically denied promising leniency, threatening or in any way inducing the Santinos to testify as to anything other than what they truthfully knew. Appellant has in no way attempted to meet his burden of proof by substantiating such unfounded allegations against appellee.

Appellant has also suggested that other Government officials involved in the investigation and development of the case against him were not present at the hearing to testify. The records strongly reflect that appellant and his counsel had sufficient time to subpoena witnesses to appear at the hearing and the Government wholeheartedly cooperated in subpoenaing all witnesses requested by appellant and his counsel.

Appellee submits that the Court's finding of fact that the Government did not knowingly use perjured testimony, if there was such, is not clearly erroneous but is completely in accord with the evidence developed at the hearing. It is further submitted that the allegations contained in appellant's brief were factually and legally insufficient to support the claim that due process had been denied to appellant.

B. Lack of Representation by Counsel at Preliminary Proceedings Before the United States Commissioner Is Not a Proper Ground for a Collateral Attack on the Validity of a Judgment and Sentence Pursuant to Section 2255.

Rule 5 of the Federal Rules of Criminal Procedure provides in pertinent part as follows:

> "(a) Appearance Before the Commissioner.
>
> "An officer making an arrest under a warrant issued upon a complaint . . . shall take the arrested person without unnecessary delay before the nearest available commissioner . . .
>
> "(b) Statement by the Commissioner.
>
> "The commissioner shall inform the defendant of the complaint against him, of his right to retain counsel and of his right to have a preliminary examination. He shall inform the defendant that he is not required to make a statement and that any statement made by him may be used against him. The commissioner shall allow the defendant reasonable time and opportunity to consult counsel and shall admit the defendant to bail as provided in these rules."

Lack of representation by counsel at the proceedings before a United States Commissioner is not an adequate ground to support a Section 2255 Motion.

> *Jones v. United States,* 223 F. Supp. 454 (E.D. Mo. 1964), *app. dism'd* 326 F. 2d 410 (8 Cir. 1964).

There is no constitutional requirement that every accused must be represented by counsel at the preliminary proceedings before the Commissioner.

Burall v. Johnston, 146 F. 2d 230 (9 Cir. 1944), *cert. denied* 325 U. S. 887 (1945);

Price v. Johnston, 144 F. 2d 260 (9 Cir. 1944), *cert. denied* 323 U. S. 789 (1944) *reh. denied* 338 U. S. 819 (1945);

Jones v. United States, supra;

Council v. Clemmer, 177 F. 2d 22 (D.C. Cir. 1949), *cert. denied* 338 U. S. 880 (1949).

The nature of the proceedings to be held before the Commissioner under Rule 5 are not so critical a stage in the judicial process that due process requires an accused to have counsel.

Latham v. Crouse, 320 F. 2d 120 (10 Cir. 1963);

Headen v. United States, 317 F. 2d 145 (D. C. Cir. 1963).

Absence of representation by counsel at proceedings before the Commissioner is not a basis for 2255 relief, unless the movant has proved by a preponderance of the evidence that he was so prejudiced by such lack of counsel that he was deprived of due process.

United States v. Reincke, 333 F. 2d 608, 613 (2 Cir. 1964);

DeToro v. Pepersack, 332 F. 2d 341 (4 Cir. 1964).

The above cited cases concerned habeas corpus proceedings by State prisoners on the grounds that they did not have counsel at the preliminary hearing as required by State law. *DeToro* involved the preliminary hearing

requirements in Maryland and *Reincke* involved the probable cause hearing requirements in Connecticut. The preliminary hearings of both States very closely parallel the proceedings provided for by Rule 5 of the Federal Rules of Criminal Procedure. In Connecticut the probable cause hearing is the same as required by Subsection (c) of Rule 5, except that the accused is required to make a plea. In Maryland no plea is required at the hearing state.

In both cases the defendants' request to have counsel at such hearing were denied. It should be noted that, unlike the instant case, these two cases involved an actual hearing, where presence of counsel might have helped in the examination of witnesses. The attacked proceeding here was not even the "preliminary hearing" contemplated by Rule 5(c), Federal Rules of Criminal Procedure. In both *DeToro* and *Reincke* the courts held that the nature of such hearings were not so critical that the absence of counsel worked "to infect [their] subsequent trial with an absence of 'the fundamental fairness essential to the concept of justice.' "

See also:

United States v. Fay, 231 F. Supp. 387 (S.D. N.Y. 1964).

Appellant has in no way shown, by a preponderance of the evidence, that his lack of representation by counsel at the bail setting proceedings before Commissioner Hocke, pursuant to Rule 5(a) and (b), Federal Rules of Criminal Procedure, infected his subsequent trial with an absence of fundamental fairness essential to the concept of justice. Appellant made no pleas, statements or waivers at that proceeding. In actuality Mr. Keslar,

who admittedly at that time was not counsel for appellant, accomplished as much for appellant by his telephone call to Commissioner Hocke prior to the proceeding as he would have if he had been present. Mr. Keslar suggested to Commissioner Hocke that the proposed $50,000 bail for appellant was pretty high. Thereafter the Commissioner set bail at $25,000 for appellant.

It is submitted that appellant's lack of representation by counsel at the proceedings before Commissioner Hocke was not a violation of due process and, therefore, was not a proper alleged ground for relief under Section 2255.

C. The Sufficiency of the Indictment in the Instant Case Is Not Subject to Collateral Attack Pursuant to the Provisions of Title 28, United States Code, Section 2255.

Issues disposed of on a previous direct appeal from a conviction are not reviewable in a subsequent petition under Section 2255.

Anthony v. United States, 331 F. 2d 687, 693 (9 Cir. 1964);

United States v. Bailey, 331 F. 2d 218 (9 Cir. 1964);

Medrano v. United States, 315 F. 2d 361 (9 Cir. 1963); *cert. den.,* 375 U. S. 854 (1963);

Fiano v. United States, 291 F. 2d 113 (9 Cir. 1959); *cert. den.,* 368 U. S. 943 (1961);

Kyle v. United States, 266 F. 2d 670 (2d Cir. 1955).

The claimed insufficiency of the indictment in this case was raised on direct appeal by the appellant [Ex. D, pp. 77-84], and this Court ruled that such a contention had no merit. *Marcella v. United States,* 285 F. 2d 322 (9 Cir. 1960), *cert. den.,* 366 U. S. 911 (1961).

Assuming *arguendo* that the sufficiency of the indictment was not questioned on direct appeal, such an issue is not a ground for collateral attack pursuant to Section 2255, *supra,* unless the indictment is so fatally defective as to deprive the Court of jurisdiction, and does not under any reasonable construction charge an offense.

Fiano v. United States, supra;

Jackson v. United States, 325 F. 2d 477 (8 Cir. 1963);

United States v. Koptik, 300 F. 2d 19 (7 Cir. 1962), *cert. den.,* 370 U. S. 957 (1962).

Appellant, in his amended motion pursuant to Section 2255 and in his opening brief to this Court, in no way specifies wherein the indictment was insufficient. He merely states general allegations and conclusionary remarks about the "sufficiency", such statements in themselves being insufficient to raise an issue in a Section 2255 motion. *Sanders v. United States,* 373 U. S. 1 (1963); *Trumblay v. United States,* 256 F. 2d 615 (7th Cir. 1958), *cert. den.,* 358 U. S. 947 (1959).

A close review of the indictment in this case reveals that appellant's suggestion as to the indictment's insufficiency has no merit. The indictment sets out clearly and in detail the offenses charged. See: *Robison v. United States,* 329 F. 2d 156 (9 Cir. 1964).

D. Appellant Was Properly Tried in the District Where the Crimes Were Committed, and Such Is Not a Proper Question in the Instant Case, as a Basis for a 2255 Motion.

Proof of jurisdiction must be questioned specifically at trial in order to be reviewable on appeal and if timely objection is not made it is waived as a later ground for a 2255 motion.

McGuire v. United States, 289 F. 2d 405 (9 Cir. 1961);

Markham v. United States, 215 F. 2d 56 (4 Cir. 1954), *cert. den.* 348 U. S. 939 (1955);

United States v. Gallagher, 183 F. 2d 342 (3 Cir. 1949), *cert. den.* 340 U. S. 913 (1951);

Casey v. United States, 20 F. 2d 752 (9 Cir. 1927), *aff'd* 276 U. S. 413 (1928).

Grounds which were apparent when the appellant took an original appeal cannot be made the basis for a second attack on a judgment pursuant to Section 2255.

Dodd v. United States, 321 F. 2d 240 (9 Cir. 1963);

Medrano v. United States, supra;

Fiano v. United States, supra;

Perno v. United States, supra;

Black v. United States, supra.

Appellant in no way at trial, objected that the Government had failed to prove that the Southern District of California was the location of the commission of the alleged offenses. Furthermore, appellant never raised such an issue on his direct appeal. Consequently, this

issue is not a proper basis for a Section 2255 motion. As stated in *Hill v. United States,* 284 F. 2d 754 (9 Cir. 1960), *cert. den.* 365 U. S. 873 (1961), the question of proof of jurisdiction refers to a test of the sufficiency of the evidence and as such must be handled by direct appeal. A Section 2255 motion cannot be substituted for such an appeal. This court said:

> "Upon collateral attack a judgment is presumptively valid unless it appears affirmatively from the record that the trial court was without jurisdiction. . . ."

See also:

Lightfoot v. United States, 327 F. 2d 207 (10 Cir. 1964).

Even if appellant had not waived his right to raise jurisdiction as a ground for his 2255 motion, the District Court's judgment is presumptively valid, and the record on its face shows a further presumption giving jurisdiction to the court. The statutory presumption in Title 21, United States Code, Section 174, provides that, once a defendant is shown to have or to have had possession of a narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction. This presumption includes not only the concealment, sale or purchase of the narcotic but also the *place* of such concealment, sale or purchase.

Ware v. United States, 309 F. 2d 457 (8 Cir. 1962);

United States v. Pisano, 193 F. 2d 355, 360 (7 Cir. 1951);

Frazier v. United States, 163 F. 2d 817, 818 (D.C. Cir. 1947), *aff'd* 335 U. S. 497 (1948);

Casey v. United States, supra;

Rosenberg v. United States, 13 F. 2d 369, 370 (9 Cir. 1926).

Appellant has not overcome such presumption which arose from proof of his possession of heroin on or about October 25, 1958, and November 30, 1958, at the Los Angeles Airport and on December 15, 1958, in Mrs. Santino's home in Hollywood, California. In actuality the proof of such possession in said locations factually proved the jurisdiction, without recourse to the presumption.

Appellant has contended that the Southern District of California had no jurisdiction in this matter because the delivery of the narcotic packages was made at San Francisco, California, *i.e.,* in the Northern District of California. Congress has enacted special provisions for jurisdiction of offenses which are begun in one district and completed in another. In Section 3237, Title 18, United States Code, it states in pertinent part:

> "(a) Except as otherwise expressly provided by enactment of Congress, any offesne against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district which such offense was begun, continued, or completed.
>
> "Any offense involving . . . transportation in interstate . . . commerce, is a continuing offense and except as otherwise expressly provided by enactment of Congress, may be inquired of and prosecuted in any district from, through or into which such commerce . . . moves."

The offenses covered by Counts Two and Three of the indictment involved a purchase, transportation and sale of heroin by either appellant or by others whom he aided and abetted, in Chicago and/or Los Angeles and/or San Francisco. Under Section 3237, he could have been prosecuted in either of the three districts encompassing those cities. The offenses covered by Counts Four and Five concerned a shipment of narcotics from Los Angeles to San Francisco by Greyhound bus. Pursuant to Section 3237, he could have been prosecuted in either the Northern District or Southern District of California. The conspiracy alleged in Count Six commenced in Los Angeles and in part was executed in Los Angeles. It, therefore, also was prosecutable in the Southern District of California.

Stopelli v. United States, 183 F. 2d 391 (9 Cir. 1950), *cert. den.* 340 U. S. 864, *reh. den.* 340 U. S. 898;

United States v. Malfi, 264 F. 2d 147 (3 Cir. 1959), *cert. den.* 361 U. S. 817 (1959).

Appellant, on page 19 of his brief, refers to a waiver of jurisdiction which he purportedly signed during trial. The record shows no such written waiver [R. T. 10]. The record of trial must be accepted as presumptively accurate and truthful, *Lipscomb v. United States,* 209 F. 2d 831 (8 Cir. 1954). Appellant has not overcome such presumption by a showing of the inaccuracy of such record.

It is submitted that appellant was tried in the District where he committed the offenses and such a question is not a proper basis for a section 2255 motion.

C. **The Sentence in the Instant Case Is Authorized by Law and Not Subject to Collateral Attack Pursuant to the Provisions of Section 2255, on the Grounds of Cruel and Unusual Punishment.**

A sentence, which is within the statutory limits as prescribed by Congress for an offense, is not subject to attack, under Section 2255, on the grounds of severity.

Randall v. United States, 324 F. 2d 727 (10 Cir. 1963);

Perno v. United States, 245 F. 2d 60 (9 Cir. 1957), *cert. den.* 362 U. S. 964 (1960);

United States v. Segelman, 212 F. 2d 88 (3 Cir. 1954).

The sentence imposed upon appellant was authorized by law and not in excess of the maximum prescribed by Congress for a violation of Title 21, United States Code, Section 174. Such section provides that anyone convicted of such violation ". . . shall be imprisoned not less than five or more than twenty years . . ."

If the severity of a sentence were open to collateral attack on the grounds of cruel and unusual punishment, it is submitted that the sentence imposed on appellant was not cruel and unusual punishment. As stated in *Black v. United States,* 269 F. 2d 38 (9 Cir. 1959), *cert. den.* 361 U. S. 938 (1960), "Ordinarily . . . where the sentence imposed is within the limits prescribed by the statute for the offense committed, it will not be regarded as cruel and unusual." See also *Gallego v. United States,* 276 F. 2d 914 (9th Cir. 1960).

The Indictment, as it pertains to appellant, sets out two distinct violations of Section 174; each violation occurring on a different date under different circumstances and concerning a separate transaction. Counts Two and Three related to a violation on November 30, 1958, and Counts Four and Five related to a violation on December 15, 1958. The wording of the Court's sentence, demonstrated the Court's intention that the two twenty-year sentences, which were ordered to run consecutively, were imposed for *each* of the two separate transactions. The final paragraph of the Court's judgment reads:

> "It is further adjudged that the concurrent 20-year sentences imposed under Counts Two and Three of the indictment and the concurrent 20-year sentences imposed under Counts Four and Five of the indictment shall run consecutively. Total time of imprisonment is forty (40) year." [T. T. p. 105].

In a recent case concerning a similar set of facts, this Court ruled that a Section 2255 motion, which raised the question of cruel and unusual punishment arising out of a sentence of 20 years imprisonment on each of two counts, said 20-year sentences to run consecutively for a total of forty (40) years, was without merit. *Anthony v. United States,* 331 F. 2d 687, 693 (9th Cir. 1964), Appellee submits that the reasoning in the *Anthony* case is applicable to this case and

hould be controlling. The Court there said, in pertinent art:

> "There is no merit to this point. The sentence was within the term prescribed by the Congress. The punishments prescribed, fine and imprisonment are and always have been customary punishments for crime in this country and cannot be said to be either cruel or unusual. The defendant was convicted of two sales on two different days and under different circumstances . . . Appellant was convicted of two separate offenses which occurred on two separate occasions. The punishment fixed for each offense was within the limit prescribed by Congress for that offense, and the Court had the discretion to order the sentences to run consecutively rather than concurrently."

See:

Lindsey v. United States, 332 F. 2d 688 (9th Cir. 1964).

Appellant states on page 20 of his brief that appellee ecommended that the Trial Court "impose the minimum-maximum term of five years". Such was not the ase. Appellee made no recommendation but merely tated "minimum mandatory sentence being required, by aw, Your Honor, I have nothing to say." [Ex. C, 9].

VII.
CONCLUSION.

The records of appellant's trial and 2255 hearing support the District Court's finding that the appellee did not knowingly use perjured testimony at appellant's trial, if indeed there was perjured testimony.

The Trial Court ruled correctly that in the instant case: (1) failure of appellant to be represented by counsel at the proceedings before the United States Commissioner, (2) failure of the appellant to be tried in the District where the alleged offenses were committed, (3) insufficiency of the indictment, and (4) the punishment imposed was cruel and unusual, were not proper grounds for a 2255 motion.

The District Court did not err in denying appellant's 2255 motion on the above grounds.

For the reasons stated, it is submitted that the District's order denying appellant's 2255 motion, should be affirmed.

Respectfully submitted,

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Certificate.

I certify that, in connection with the preparation of his brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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